Supreme Court, U.S.
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No. 02-969

IN THE
Supreme Court of the United States

ROBERT C. KONOP,

Petitioner,

v.

HAWAIIAN AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR HAWAIIAN AIRLINES, INC. IN OPPOSITION

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QUESTION PRESENTED

The courts of appeals have uniformly held that the Wiretap Act applies to electronic communications in transmission, but not in storage. Respondent's agents allegedly accessed electronic data stored on petitioner's website. Did the court of appeals correctly conclude that respondent had not violated the Wiretap Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, respondent Hawaiian Airlines, Inc., a public company, states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR HAWAIIAN AIRLINES, INC. IN OPPOSITION

Respondent Hawaiian Airlines, Inc. respectfully submits that the interlocutory petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-45) is reported at 302 F.3d 868. A prior opinion of the court of appeals was reported at 236 F.3d 1035, but was withdrawn by the panel by in an order reported at 262 F.3d 972. The order of the district court granting in part respondent's motion for summary judgment (Supp. Pet. App. 1-4) is not reported.

JURISDICTION

The judgment below was entered on August 23, 2002. A timely petition for rehearing was denied on October 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

After a Hawaiian officer allegedly accessed a website maintained by petitioner, petitioner sued Hawaiian for violating the Wiretap Act. The district court concluded on summary judgment that the Wiretap Act did not apply to petitioner's claims, and the court of appeals affirmed.

1. The Wiretap Act, 18 U.S.C. §§ 2510-22, originally enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, makes it unlawful, subject to a number of exceptions, for any person to "intercept

. . . any wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a). Before 1986, the Wiretap Act applied only to wire and oral communications. It was amended to apply to certain electronic communications by the Electronic Communications Privacy Act ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1858 (1986). Title I of the ECPA amended the Wiretap Act to add electronic communications to the scope of prohibited interceptions. *See* S. Rep. No. 541, 99th Cong., 2d Sess. 3 (1986).

Title I of the ECPA also provided for the first time that the Wiretap Act applied to "electronic storage" of wire communications (*e.g.*, voicemail), but not electronic communications. S. Rep. No. 541, *supra*, at 14. Title II of the ECPA added a new set of provisions, known as the Stored Communications Act, which generally prohibit "access" to data stored on computer services. 18 U.S.C. §§ 2701-10. The Stored Communications Act is considerably less restrictive than the Wiretap Act. The Wiretap Act was recently amended again to remove stored wire communications from the scope of interceptions prohibited by the Wiretap Act. USA PATRIOT Act, Pub. L. No. 107-56, § 209, 115 Stat. 272, 283 (2001). "The purpose of the recent amendment was to reduce protection of voice mail messages to the lower level of protection provided other electronically stored communications." Pet. App. 15 (citing H.R. Rep. No. 236(I), 107th Cong., 2d Sess. 158-59 (2001)).

2. Petitioner, who was employed as a Hawaiian pilot, "created and maintained a website where he posted bulletins critical of his employer, its officers, and the incumbent union." Pet. App. 3. He required visitors to his website to log in with a user name and password, which

he provided to certain Hawaiian employees but not to managers or union representatives. *Ibid.* Two Hawaiian pilots to whom petitioner had supplied user names authorized a Hawaiian manager to log on to the site using their user names. *See id.* at 3-4. After the manager allegedly did so, petitioner sued Hawaiian for violating, *inter alia*, the Wiretap Act and the Stored Communications Act.

a. The district court granted summary judgment to Hawaiian. The court concluded that the Wiretap Act did not apply to petitioner's claims. Supp. Pet. App. 3 n.1. The court also concluded that the Stored Communications Act claim failed because the Hawaiian manager "accessed [petitioner's] website with the consent of two other pilots," and thus was authorized by 18 U.S.C. § 2701(c)(2). *Id.* at 3.

b. In its initial opinion, the court of appeals concluded that petitioner had sufficiently alleged a violation of the Wiretap Act. In so doing, the court acknowledged that its holding was contrary to that of the Fifth Circuit in *Steve Jackson Games* v. *United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), which had held that only the Stored Communications Act, and not the Wiretap Act, applies to stored electronic communications. *See* 236 F.3d at 1044. Hawaiian's petition for rehearing was supported by *amicus* briefs from the United States Department of Justice and the California District Attorneys Association. The panel withdrew its opinion. 262 F.3d 972.

In its revised opinion, the panel majority concluded that the Wiretap Act does not apply to stored electronic communications. The court held "that for a website such as [petitioner's] to be 'intercepted' in violation of

the Wiretap Act, it must be acquired during transmission, not while it is in electronic storage." Pet. App. 15. As the court noted, this construction was consistent with the plain language and structure of the statute, the decisions of all courts to have considered the question, and Congress' implicit approval of those decisions in enacting the USA PATRIOT Act. *See id.* at 13-16. The panel concluded, however, that Hawaiian could be liable under the Stored Communications Act because the pilots who gave the manager permission to use their user names may not have been authorized "users" of the website within the meaning of the statute as construed by the court. *Id.* at 19-20.

Judge Reinhardt dissented from the panel's construction of the Wiretap Act. Pet. App. 33-45.

ARGUMENT

There is no conflict of decision on the inapplicability of the Wiretap Act to stored electronic communications, the decision below is correct, and the petition is interlocutory.

1. Contrary to petitioner's contention, the decision below does not conflict with any decision of this Court or of any other court of appeals.

a. Although petitioner refers throughout his petition to *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), the decision in that case has nothing to do with the applicability of the Wiretap Act to stored electronic communications. The electronic communication at issue in *Bartnicki* (a telephone conversation) was intercepted contemporaneously, and thus the question presented in this case was not presented in *Bartnicki*. Moreover, the Court in *Bartnicki* made the "important assumption[]" that "the

interception was intentional, and therefore unlawful." *Id.* at 524-25. The Court thus was not called upon to construe the statutory term "intercept" as it applies to electronic communications.

b. Petitioner contends that the decision below is inconsistent with Ninth Circuit precedent, particularly *United States* v. *Smith*, 155 F.3d 1051 (9th Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999). *See* Pet. 11, 16. Even if he were correct, such a conflict would not provide a basis for review in this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties"). In any event, the conflict alleged by petitioner does not exist.

In *Smith*, the Ninth Circuit held that the Wiretap Act applied to voicemail messages because they were "wire communications" in "electronic storage." Based on the (since-repealed) extension of the statute to stored wire communications, the court rejected a narrow construction of the term "intercept" with respect to such communications. The *Smith* court went on to observe that "in cases concerning 'electronic communication[s]'—the definition of which specifically includes 'transfer[s]' and specifically excludes 'storage'—the 'narrow' definition of 'intercept' fits like a glove; it is natural to except non-contemporaneous retrievals from the scope of the Wiretap Act." 155 F.3d at 1057. The *Smith* court endorsed *Steve Jackson Games* and other decisions holding the Wiretap Act inapplicable to stored electronic communications. *Ibid.* Thus, as the panel majority recognized (Pet. App. 14), there is no inconsistency between *Smith* and the decision below.

c. Petitioner suggests, erroneously, that there is a "divergence of opinion" (Pet. 16) or "irreconcilable conflict" (*id.* at 17) among the circuits on the question whether the statutory requirement of "intercept[ion]" includes a contemporaneity requirement such that a stored communication cannot be "intercept[ed]." To the contrary, every court to have considered it has concluded that the Wiretap Act does not apply to stored electronic communications.

In *United States* v. *Turk*, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976), the Fifth Circuit held that an "interception" must be contemporaneous with a transmission to be prohibited by the Wiretap Act. The same court in *Steve Jackson Games* applied this rule to conclude that accessing stored electronic communications cannot be "intercepted" within the meaning of the Wiretap Act. 36 F.3d at 462-63 & n.8. A number of other courts have reached the same conclusion. *See United States* v. *Meriwether*, 917 F.2d 955 (6th Cir. 1990), *Wesley College* v. *Pitts*, 974 F. Supp. 375 (D. Del. 1997), *aff'd mem.*, 172 F.3d 861 (3d Cir. 1998); *United States* v. *Moriarty*, 962 F. Supp. 217 (D. Mass. 1997); *Bohach* v. *City of Reno*, 932 F. Supp. 1232 (D. Nev. 1996); *United States* v. *Reyes*, 922 F. Supp. 818 (S.D.N.Y. 1996). There is no contrary authority.

2. The decision below is correct. The statutory language and structure make clear that the Stored Communications Act, and not the Wiretap Act, applies to stored electronic communications. In the ECPA, Congress expressly extended the Wiretap Act to stored wire communications, but not stored electronic communications. Congress was well aware of the difference between communications in transit and communications in stor-

age and, with respect to electronic communications, chose to apply the Wiretap Act only to the former. When the ECPA was enacted, the contemporaneity requirement was well-established and thus was implicitly endorsed by Congress.

In enacting the USA PATRIOT Act, Congress removed any doubt as to the continued viability of the contemporaneity requirement:

> When Congress passed the USA PATRIOT Act, it was aware of the narrow definition courts had given the term "intercept" with respect to electronic communications, but chose not to change or modify that definition. To the contrary, it modified the statute to make that definition applicable to voice mail messages as well. Congress, therefore, accepted and implicitly approved the judicial definition of "intercept" as acquisition contemporaneous with transmission.

Pet. App. 15; *see, e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

3. The petition is interlocutory. The court of appeals remanded petitioner's claims under the Stored Communications Act and Railway Labor Act for further proceedings. Pet. App. 32-33. This Court's customary practice is to "await final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting denial of certiorari); *see, e.g.*, *Brotherhood of Locomotive Firemen* v.

Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam). There is no reason to depart from that practice in this case, and good reason to follow it.

The court of appeals remanded for a determination of the factual question whether the consent exception to the Stored Communications Act relieved Hawaiian of liability for its manager's accessing petitioner's website. Pet. App. 20. The Wiretap Act contains a similar consent exception. 18 U.S.C. § 2511(2)(d); *see* Pet. App. 19 n.9. It is Hawaiian's position that the pilots who authorized the manager to use their user names were intended recipients of the information on petitioner's website with authority to grant consent. *Cf. United States* v. *Cassiere*, 4 F.3d 1006 (1st Cir. 1993); *Obron Atlantic Corp.* v. *Barr*, 990 F.2d 861 (6th Cir. 1993). If the trier of fact accepts this position, it would shield Hawaiian from liability not only under the Stored Communications Act but also under the Wiretap Act (as construed by petitioner). Thus, the question presented in the petition could be effectively mooted by further proceedings in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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